Lee Ah Seng & Anor v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEALS NO 05–67 OF 2005(J) AND NO 05–68 OF 2005(J)
ALAUDDIN, NIK HASHIM, ABDUL AZIZ MOHAMAD, ARIFIN ZAKARIA AND AZMEL FCJJ
26 JULY 2007

Criminal Procedure — Appeal — Fact, finding of — Appellants' conviction of murder based on evidence of witness — Appellate interference — Audio visual advantage — Whether palpable and overriding error by trial judge

Evidence — Witness — Credibility of — Eye witness testimony of murder — Poor quality of evidence — Common intention whether evidence ought to be disregarded — Deliberate omission in first information report — Contradictions and discrepancies in witness's evidence — Whether trial judge correct in finding witness truthful and reliable — Circumstantial evidence — Whether trial judge erred in assessment of facts — Whether appellants' conviction unsafe

After the close of the case for the prosecution, the appellants were called to enter upon their defence. The defence of the first appellant, ('Ah Hong') was one of alibi. The defence of the second apellant ('Ah Seng') was a denial. The only eye witness evidence against the appellants was that of Lee Cheng Soi, a Chinese Muslim whose Muslim name is Hassan bin Abdullah ('Hassan Lee — SP7'). The appellants were convicted and sentenced to death by the High Court at Johore Bahru for the murder of one Sanip bin Leham. They had appealed to the Court of Appeal which dismissed their appeals (see [2006] 2 MLJ 528). Hence these appeals to this court. Counsel for the appellants submitted that the death of the deceased was not caused by the appellants as there was no evidence how the deceased was hit and that there were discrepancies in SP7's evidence particularly on the contents of his first information report (P24) where he failed to mention the names of the appellants and this failure constituted a material omission in P24. SP7 was also not consistent in his evidence. Learned counsel also submitted that therefore it was wrong for the court to find that common intention was established when the evidence of SP7 should not have been believed due to its poor quality.

Held (by majority) allowing the appeals, quashing the convictions and setting aside the sentences imposed:

(1) (per **Abdul Aziz Mohamad FCJ**, **Alauddin** and **Nik Hashim FCJJ** concurring) The most important ground in this appeal is that it is not safe to convict the appellants on the evidence of Hassan Lee, whose evidence was the only evidence that implicated the appellants, because it is not safe to treat

Hassan Lee as a truthful witness. The veracity of Hassan Lee is brought into question by reason of several discrepancies between his police report (P24), which was the first information report ('FIR'), and his evidence and by reason of certain unsatisfactory features in his evidence. Of the discrepancies, the most prominent and significant is the omission to mention in the FIR the involvement of the appellants and the alleged pursuit of Sanip after he came out of his shack. The omission is not one of mere detail but of the important second half of the events that were related in evidence. That section of the evidence is important because it was there that the appellants were implicated and also because, even if it was true that Sanip said in the shack that he was being hit, the finding of the wooden lath and piece of iron pipe near where Sanip's body was found lying near the pool would suggest that he might have received further injuries there and that, if Hassan Lee's evidence about the chase was true, the chase ended with the infliction of those injuries. But the FIR stopped short at the point where Sanip came out of his shack and omitted to state the pursuit and the persons who did the pursuing. It has also to be borne in mind that the omission was not due to the decision of the officer who took down the report that it was only necessary, for the purposes of an FIR, to write down only so much, but was, on Hassan Lee's own admission, a deliberate omission on his part (see para 35).

(2) (per **Abdul Aziz Mohamad FCJ**, **Alauddin** and **Nik Hashim FCJJ** concurring) In this case the deliberate failure of Hassan Lee to mention in the FIR the second half of the incident, including the appellants' involvement in it, should have given cause to the learned trial judge to be very careful about accepting Hassan Lee's evidence of the appellants' complicity in the crime. Of course if there was a reasonable explanation for the failure, it should not have any effect on the veracity of Hassan Lee. As has been stated, the reason that he gave for the failure was his fear that Sanip's child or children would quarrel with Ah Hong. The learned trial judge firstly treated the failure 'as an omission as to details', which, as already shown, it clearly was not, and secondly, as regards Hassan Lee's explanation, said that 'there is nothing incredible in the reasoning for the court not to accept the explanation' (see para 38).

(3) (per **Abdul Aziz Mohamad FCJ**, **Alauddin** and **Nik Hashim FCJJ** concurring) The explanation was inherently improbable. It is unnatural for a person who claims to have seen another commit a crime to report the crime and yet withhold the identity of the perpetrator, because the purpose of reporting a crime is to bring the wrongdoer to justice. It would require a very strong reason to deter one from revealing the culprit. The reason given by Hassan Lee was extremely weak. No reason was given as to why he was so protective of Ah Hong, who to his mind was involved in the commission of a crime against Sanip, who was his friend, from any likely trouble from Sanip's children. Even if the bergaduh that Hassan Lee feared was that Ah Hong's children would seek to wreak vengeance on Ah Hong, no reason was given — such as the character of Sanip's children — as to why Hassan Lee thought that Sanip's children would take the law into their own hands and not let the law take its course. Furthermore, Hassan Lee would surely have thought, as everyone else would, that if he mentioned the appellants to the police, the

police would be likely to immediately arrest them, so that there would be no question of Sanip's children going after Ah Hong. Or even if Hassan Lee feared that some time would elapse before the police could arrest Ah Hong, he was not likely to have thought that in the meantime the fact that he had mentioned Ah Hong to the police would leak out to Sanip's children and that they would get at Ah Hong before the police could. Then there is the consideration that by failing to reveal the identity of Ah Hong in order to protect him from Sanip's children, Hassan Lee placed his own self in jeopardy, since, as it turned out, he himself was arrested as a suspect. It is unlikely that Hassan Lee could have failed to foresee such a consequence of his reticence. There is no reason to make it credible that Hassan Lee was so concerned for Ah Hong's welfare as to be willing to face the risk of jeopardy himself. Looked at from any angle, Hassan Lee's explanation was absurd (see para 39).

(4) (per **Abdul Aziz Mohamad FCJ**, **Alauddin** and **Nik Hashim FCJJ** concurring) As to being unshaken in cross-examination, Hassan Lee's mere insistence that he saw the appellants chasing Sanip does not necessarily make him a witness of truth. The fact, however, is that he was shaken in cross-examination at least in one important respect pertaining to the appellant Ah Seng. As has been related, in examination-in-chief he stated positively that he saw both the appellants chasing Sanip, each carrying a stick, but in cross-examination and even in re-examination he said that the appellant Ah Seng was not carrying anything and was not doing anything. Since Hassan Lee's evidence consisted, in essence, only of his hearing Sanip's cry and seeing the appellants chasing Sanip, each carrying a piece of wood, his subsequent dropping of Ah Seng out of that picture constitutes being shaken as to fifty per cent of his evidence (see para 44).

(5) (per **Abdul Aziz Mohamad FCJ**, **Alauddin** and **Nik Hashim FCJJ** concurring) The evidence of the chemist cannot be used as circumstantial evidence pointing to the appellants. The evidence of the chemist merely served to link the exhibits found to the victim. The evidence of the pathologist merely served to establish the cause of death and intention to cause death. Their evidence did not serve to establish the identity of the offenders (see para 52).

(6) (per **Abdul Aziz Mohamad FCJ**, **Alauddin** and **Nik Hashim FCJJ** concurring) It is not only in the implicating of the appellants in the events that took place on the night in question that Hassan Lee's evidence is open to reasonable doubt, by reason that his reason for not mentioning the appellants in the FIR is absurd. There are indications that make for doubting that the events of that night occurred as Hassan Lee related them in evidence. In cross-examination it was put to him that he was covering up certain facts pertaining to this case, which he of course denied (see para 55).

(7) (per **Nik Hashim FCJ** dissenting) The approach to be taken by an appellate court when dealing with a trial court's assessment of credibility of witness is well-established by high authorities. The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing

with the finding. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject (see para 9).

(8) (per **Nik Hashim FCJ** dissenting) Thus, applying the above principles to the facts of this case, it is clear that the learned judicial commissioner was alive to the fact that there were contradictions and discrepancies in the evidence of SP7 and nevertheless held that SP7 was a witness of truth. He ruled that the discrepancies were insufficient to destroy SP7's credibility on the issue of identification. He gave his reasons for his finding: such as the short distance between the appellants and SP7 during the incident and the moonlit night. He found the explanation given by SP7 as to why the names of the appellants were not mentioned in P24 to be credible. It must not be forgotten that P24 is not an encyclopedia. All that is required for purpose of s 107 of the Criminal Procedure Code is that there should be clear and definite information about the commission of a cognizable offence to set the investigation machinery in motion. It needs not contain the names of the offenders as in the case here (see para 10).

(9) (per **Nik Hashim FCJ** dissenting) With regard to the proof of common intention, the court agreed with the finding of the learned judicial commissioner that common intention may be inferred from the facts and circumstances of the case which are found in the testimony of SP7 who gave an eye witness account of seeing both the appellants together with two others at the scene, both holding something which resemble a piece of wood (P9(a)) and seeing both the appellants chasing the deceased. On this issue, there was no misdirection on the part of the learned judicial commissioner (see para 11).

(10) (per **Nik Hashim FCJ** dissenting) The learned judicial commissioner was correct to hold that the respondent had succeeded in proving its case beyond any reasonable doubt and that he had considered and accepted the oral evidence of SP7 and that there were no reasons to question his credibility as a witness. The case for the prosecution is neither incredible nor improbable. Since this court had no audio-visual advantage of the witness, it was only proper that this court deferred to the views of the learned trial judicial commissioner (see para 15).

(11) (per **Azmel FCJ** dissenting) These appeals were based entirely on findings of facts made by the learned trial judicial commissioner. The conviction of the two appellants for the offence of murder of one Sarip bin Leham were based mainly on the evidence of SP7. Despite the existence of discrepancies in the evidence of SP7 the learned judicial commissioner still accepted SP7 to be a truthful and reliable witness as he was satisfied with SP7's explanation in respect of the discrepancies. In arriving at this conclusion the learned judicial commissioner had carefully scrutinized the evidence before him and the submissions of both the accused counsel (see para 60).

(12) (per **Azmel FCJ** dissenting) It has been generally accepted that the evidence of a witness will contain contradictions and discrepancies. But that does not mean that he is not a truthful and unreliable witness. In other words no witness is capable of giving perfect evidence. And it has been frequently ruled by courts that flawless evidence of a witness should be looked with suspicion as there is great likelihood that he had been coached or his evidence concocted (see para 61).

(13) (per **Azmel FCJ** dissenting) The ability of a witness to narrate and recollect any particular incident depends very much on his level of education, intelligence, upbring and experience. Hence one witness may perceive the incident differently from another witness. One witness may be able to give detailed account while the other may only be able to give it scantily. But both may be telling the truth of what they perceive of the same incident. It is true, however, that certain witnesses may not be telling the truth. Hence it is very essential for the trial judge to observe the behaviour or the demeanour of the witness while giving evidence (see para 62).

[Bahasa Malaysia summary

Setelah penutup kes pihak pendakwaan, perayu-perayu dipanggil untuk memasukkan pembelaan mereka. Pembelaan perayu pertama ('Ah Kong') merupakan alibi. Pembelaan perayu kedua ('Ah Seng') merupakan satu penafian. Satu-satunya saksi keterangan terhadap perayu-perayu adalah Lee Cheng Soi, seorang Cina Muslim yang mempunyai nama Muslimnya Hassan bin Abdullah ('Hassan Lee – SP7'). Perayu-perayu telah disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi Johor Bahru kerana membunuh Sanip bin Leham. Mereka telah merayu ke Mahkamah Rayuan yang telah menolak rayuan-rayuan mereka (lihat [2006] 2 MLJ 528). Justeru itu rayuan-rayuan ini dikemukakan ke mahkamah ini. Peguam bagi pihak perayu-perayu berhujah bahawa kematian si mati bukan disebabkan oleh perayu-perayu kerana tiada keterangan menunjukkan bagaimana si mati telah dipukul dan bahawa terdapat percanggahan dalam keterangan SP7 khususnya tentang kandungan laporan maklumat pertamanya (P24) di mana beliau telah gagal untuk menyebut nama-nama perayu-perayu dan kegagalan ini membentuk suatu peninggalan penting dalam P24. SP7 juga tidak konsisten dalam keterangannya. Peguam bijaksana juga berhujah bahawa ianya salah untuk mahkamah ini mendapati terdapat niat bersama dibuktikan apabila keterangan SP7 tidak sepatutnya dipercayai oleh sebab kualitinya yang rendah.

Diputuskan, dengan majoriti membenarkan rayuan-rayuan tersebut, membatalkan sabitan-sabitan dan mengenepikan hukuman-hukuman yang dikenakan:

(1) (oleh **Abdul Aziz Mohamad HMP**, **Alauddin** dan **Nik Hashim HHMP** bersetuju) Alasan yang penting dalam rayuan ini adalah bahawa ianya tidak selamat untuk menyabitkan perayu-perayu berdasarkan keterangan Hassan Lee, yang mana keterangannya merupakan satu-satunya keterangan yang membabitkan perayu-perayu, kerana ia tidak selamat untuk menganggap Hassan Lee sebagai saksi yang boleh dipercayai. Kebenaran cakap Hassan Lee

dipersoalkan oleh sebab beberapa percanggahan antara laporan poli beliau (P24), yang merupakan laporan maklumat pertama ('FIR'), dan keterangannya dan oleh sebab ciri-ciri tertentu yang tidak memuaskan dalam keterangan beliau. Antara percanggahan tersebut, yang ketara dan penting adalah peninggalan untuk menyebut dalam FIR tentang pembabitan perayu-perayu dan pengataan tentang mencari Sanip selepas beliau keluar daripada pondoknya. Peninggalan itu bukan hanya butiran tetapi bahagian kedua yang penting tentang kejadian yang telah dikaitkan dalam keterangan. Bahagian keterangan tersebut adalah penting kerana di sinilah perayu-perayu dibabitkan dan juga kerana, meskipun adalah benar bahawa Sanip telah mengatakan beliau telah dipukul dalam pondik itu, penemuan sekeping kayu dan paip besi berdekatan badan Sanip yang didapati terbaring di tepi kolak mencadangkan bahawa beliau mungkin mengalami kecederaan di situ dan bahawa, jika keterangan Hassan Lee tentang pengejaran itu adalah benar, pengejaran tersebut berakhir dengan kecederaan tersebut. Namun FIR itu hanya menyebut tentang Sanip keluar daripada pondok dan tidak menyatakan pencarian itu dan mereka yang membuat pencarian itu. Ia juga perlu ditekankan bahawa peninggalan itu bukan disebabkan keputusan pegawai yang mengambil laporan itu bahawa ia hanya perlu, bagi tujuan satu FIR, untuk menulis setakat itu, tetapi adalah, berdasarkan pengakuan Hassan Lee, satu peninggalan yang disengajakan di pihaknya (lihat perenggan 35).

(2) (oleh **Abdul Aziz Mohamad HMP**, **Alauddin** dan **Nik Hashim HHMP** bersetuju) Dalam kes ini kegagalan yang disengajakan oleh Hassan Lee untuk menyatakan dalam FIR tentang bahagian kedua kepada kejadian itu, termasuklah penglibatan perayu-perayu di dalamnya, hendaklah memberikan sebab untuk hakim perbicaraan yang bijaksana untuk berhati-hati menerima keterangan Hassan Lee tentang persubahatan perayu-perayu dalam jenayah tersebut. Oleh itu jika terdapat satu penjelasan munasabah tentang kegagalan itu, ia tidak sepatutnya mempunyai sebarang kesan terhadap kebenaran cakap Hassan Lee. Seperti yang telah dinyatakan, alasan yang telah diberikan oleh beliau kerana kegagalan tersebut adalah ketakutannya yang anak atau anak-anak Sanip akan bergaduh dengan Ah Hong. Hakim perbicaraan yang bijaksana pertamanya menganggap kegagalan itu 'as an omission as to details' yang, telahpun ditunjukkan, jelas bukan begitu, dan keduanya, berhubung penjelasan Hassan Lee, mengatakan bahawa 'there is nothing incredible in the reasoning for the court not to accept the explanation' (lihat perenggan 38).

(3) (oleh **Abdul Aziz Mohamad HMP**, **Alauddin** dan **Nik Hashim HHMP** bersetuju) Penjelasan tersebut memang sukar diterima akal. Ia tidak bersifat semula jadi untuk seseorang yang mendakwa telah melihat seseorang melakukan jenayah melaporkan tentang jenayah itu tetapi menyembunyikan identiti pesalah, kerana tujuan melaporkan suatu jenayah adalah untuk membawa pesalah ke muka pengadilan. Maka perlu ada alasan kukuh untuk menghalang seseorang itu daripada mendedahkan orang yang melakukan kesalahan tersebut. Alasan yang diberikan oleh Hassan Lee tidak kukuh. Tiada alasan diberikan tentang kenapa beliau begitu melindungi Ah Hong, yang kepadanya terlibat dalam perlakuan jenayah terhadap Sanip, yang merupakan rakannya, daripada kemungkinan masalah daripada anak-anak Sanip. Jikapun pergaduhan yang Hassan takuti itu adalah di mana anak-anak

Ah Hong akan membalas dendam terhadap Ah Hong, tiada alasan telah diberikan – seperti sifat anak-anak Sanip – dan kenapa Hassan Lee berfikiran anak-anak Sanip akan membuat undang-undang mereka sendiri dan tidak menunggu tindakan undang-undang dilaksanakan. Bahkan, Hassan Lee semestinya berfikiran, begitu juga orang lain, akan, jika beliau menyebut tentang perayu-perayu kepada polis, polis mungkin dengan segera menangkap mereka, agar tiada persoalan tentang anak-anak Sanip mencari Ah Hong. Jikapun Hassan Lee takut masa akan berlalu sebelum polis menangkap Ah Hong, beliau tidak mungkin berfikir buat sementara itu hakikat beliau telah menyebut tentang Ah Hong kepada pihak polis akan tersebar kepada anak-anak Sanip dan mereka akan mencari Ah Hong sebelum pihak polis. Maka terdapat pertimbangan bahawa dengan kegagalan untuk mendedahkan identiti Ah Hong bagi tujuan melindungi dirinya daripada anak-anak Sanip, Hassan Lee meletakkan dirinya dalam bahaya, memandangkan, seperti yang terjadi, beliau sendiri telah ditangkap sebagai orang yang disyaki. Tidak mungkin Hassan Lee gagal menjangkakan akibat keberatannya untuk bercakap. Tiada alasan untuk menjadikannya boleh dipercayai yang Hassan Lee amat risau tentang keselamatan Ah Hong sehingga sanggup berhadapan dengan risiko berada dalam bahaya. Dilihat daripada mana-mana sudut, penjelasan Hassan Lee adalah melampau (lihat perenggan 39).

(4) (oleh **Abdul Aziz Mohamad HMP**, **Alauddin** dan **Nik Hashim HHMP** bersetuju) Sifat tidak goyah Hassan Lee semasa pemeriksaan balas, pendesakan beliau yang beliau hanya melihat perayu-perayu mengejar Sanip tidak semestinya membuatnya seorang saksi yang boleh dipercayai. Hakikatnya, bagaimanapun, adalah bahawa beliau telah digoyahkan dalam pemeriksaan balas sekurang-kurangnya dalam satu aspek berkaitan perayu Ah Seng. Seperti yang telah dinyatakan, dalam pemeriksaan utama beliau menyatakan secara positif bahawa beliau melihat kedua-dua perayu mengejar Sanip, masing-masing membawa kayu, tetapi dalam pemeriksaan balas dan juga pemeriksaan semula beliau menyatakan bahawa perayu Ah Seng tidak membawa apa-apa dan tidak berbuat apa-apa. Memandangkan keterangan Hassan Lee mengandungi, secara inti pati, hanya pendengaran jeritan Sanip dan melihat perayu-perayu mengejar Sanip, masing-masing membawa sekeping kayu, kenyataan beliau seterusnya yang meninggalkan Ah Seng daripada gambaran tersebut menunjukkan lima puluh peratus daripada keterangannya telah digoyahkan (lihat perenggan 44).

(5) (oleh **Abdul Aziz Mohamad HMP**, **Alauddin** dan **Nik Hashim HHMP** bersetuju) Keterangan ahli kimia tidak boleh digunakan sebagai keterangan mengikut keadaan yang menunjuk kepada perayu-perayu. Keterangan ahli kimia hanya digunakan untuk mengaitkan ekshibit-ekshibit yang dijumpai dengan mangsa. Keterangan pakar patologi hanya digunakan untuk menunjukkan sebab kematian dan niat untuk menyebabkan kematian. Keterangan mereka tidak digunakan untuk menunjukkan identiti pesalah-pesalah (lihat perenggan 52).

(6) (oleh **Abdul Aziz Mohamad HMP**, **Alauddin** dan **Nik Hashim HHMP** bersetuju) Bukan hanya dengan membabitkan perayu-perayu dalam kejadian yang berlaku pada malam dipersoalkan yang mana keterangan Hassan Lee

terbuka kepada keraguan munasabah, dengan alasan bahawa sebab beliau tidak menyebut tentang perayu-perayu dalam FIR adalah melampau. Terdapat tanda-tanda yang menimbulkan keraguan tentang kejadian yang berlaku pada malam itu seperti yang diterangkan oleh Hassan Lee dalam keterangannya. Dalam pemeriksaan balas telah dikatakan bahawa beliau menyembunyikan fakta tertentu berkaitan kes ini, yang sememangnya telah dinafikan olehnya (lihat perenggan 55).

(7) (oleh **Nik Hashim HMP** menentang) Pendekatan yang perlu diambil oleh mahkamah rayuan apabila mengendalikan penilaian kebolehpercayaan saksi mahkamah perbicaraan telah ditetapkan oleh autoriti-autoriti tinggi. Kebolehpercayaan saksi terutamanya untuk hakim perbicaraan. Suatu mahkamah rayuan hendaklah sentiasa tidak terburu-buru dalam mengganggu penemuan fakta sedemikian yang diputuskan oleh hakim yang mempunyai kelebihan alat pandang dengar terhadap saksi, kecuali terdapat alasan-alasan yang substantif dan menarik untuk tidak bersetuju dengan penemuan itu. Percanggahan selalunya didapati dalam keterangan saksi tetapi apa yang hakim perlu tentukan adalah sama ada ianya percanggahan yang kecil atau penting. Adalah salah untuk hanya menyatakan oleh sebab keterangan seorang saksi mungkin telah bercanggah ataupun beliau mungkin telah menipu satu atau dua perkara, keterangannya sepatutnya ditolak sama sekali. Dalam analisis akhir ia adalah untuk hakim perbicaraan menentukan bahagian keterangan saksi yang beliau terima dan yang mana ditolak (lihat perenggan 9).

(8) (oleh **Nik Hashim HMP** menentang) Oleh itu, dengan menggunakan prinsip-prinsip di atas untuk fakta-fakta kes ini, adalah jelas, bahawa pesuruhjaya kehakiman yang bijaksana menyedari tentang fakta bahawa terdapat penyanggahan dan percanggahan dalam keterangan SP7 dan meskipun begitu telah memutuskan bahawa SP7 merupakan saksi yang boleh dipercayai. Beliau memutuskan bahawa penyanggahan tersebut tidak memadai untuk menjejaskan kebolehpercayaan SP7 berhubung isu pengenalpastian. Beliau memberikan alasan-alasannya untuk penemuan tersebut: seperti jarak dekat antara perayu-perayu dan SP7 semasa kejadian itu dan cahaya bulan. Beliau mendapati penjelasan yang diberikan oleh SP& berhubung kenapa nama-nama perayu-perayu yang tidak disebutkan dalam P24 sebagai boleh dipercayai. Tidak boleh dilupakan bahawa P24 bukan kamus. Apa yang diperlukan bagi tujuan s 107 Kanun Acara Jenayah adalah perlu terdapat maklumat jelas dan tetap tentang perlakuan kesalahan yang disedari untuk menetapkan pergerakan pasukan penyiasat. Ia tidak perlu mengandungi nama-nama pesalah-pesalah seperti dalam kes di sini (lihat perenggan 10).

(9) (oleh **Nik Hashim HMP** menentang) Berhubung bukti niat bersama, mahkamah bersetuju dengan penemuan pesuruhjaya kehakiman yang bijaksana bahawa niat bersama boleh dibuat kesimpulan daripada fakta-fakta dan keadaan kes yang didapati dalam testimoni SP7 yang memberikan pandangan sebagai saksi utama yang telah melihat kedua-dua perayu dengan dua orang lain di tempat kejadian, kedua-duanya memegang sesuatu yang kelihatan seperti sekeping kayu (P9(a)) dan melihat kedua-dua perayu mengejar si mati. Berkaitan isu ini, tiada salah arah di pihak pesuruhjaya kehakiman yang bijaksana itu (lihat perenggan 11).

(10) (oleh **Nik Hashim HMP** menentang) Pesuruhjaya kehakiman adalah betul untuk memutuskan bahawa responden telah berjaya dalam membuktikan kesnya melampaui apa-apa keraguan munasabah dan bahawa beliau telah mempertimbangkan dan menerima keterangan lisan SP7 dan bahawa tiada alasan untuk mempersoalkan kebolehpercayaannya sebagai seorang saksi. Kes bagi pihak pendakwaan bukanlah suatu yang sukar dipercayai mahupun suatu yang tidak berkemungkinan berlaku. Memandangkan mahkamah ini tiada kelebihan alat pandang dengar mengenai saksi, ia hanya betul untuk mahkamah ini mengikut pandangan pesuruhjaya kehakiman yang bijaksana itu (lihat perenggan 15).

(11) (oleh **Azmel HMP** menentang) Rayuan-rayuan tersebut secara keseluruhannya adalah berdasarkan penemuan fakta-fakta yang dibuat oleh pesuruhjaya kehakiman perbicaraan yang bijaksana. Sabitan kedua-dua perayu tersebut untuk membunuh Sanip bin Leham terutamanya berdasarkan keterangan SP7. Meskipun terdapat percanggahan dalam keterangan SP7 pesuruhjaya kehakiman yang bijaksana masih menerima SP7 sebagai seorang saksi yang jujur dan boleh dipercayai kerana beliau berpuas hati dengan penjelasan SP7 berkaitan percanggahan tersebut. Untuk tiba kepada kesimpulan ini pesuruhjaya kehakiman yang bijaksana dengan terperinci meneliti keterangan di hadapannya dan penghujahan kedua-dua peguam tertuduh (lihat perenggan 60).

(12) (oleh **Azmel HMP** menentang) Adalah diterima secara amnya bahawa keterangan saksi akan mengandungi penyanggahan dan percanggahan. Namun itu tidak bermaksud bahawa beliau bukan saksi yang jujur dan boleh dipercayai. Dalam perkataan lain tiada saksi yang berkemampuan untuk memberikan keterangan yang sempurna. Dan ini sering diputuskan oleh mahkamah bahawa keterangan saksi yang tiada cacat celanya hendaklah dilihat dengan rasa syak kerana besar kemungkinan beliau telah diberi bimbingan atau keterangannya direka-reka (lihat perenggan 61).

(13) (oleh **Azmel HMP** menentang) Keupayaan seorang saksi untuk menceritakan dan mengingat kembali apa-apa kejadian tertentu bergantung kepada tahap pelajaran, kepintaran, asuhan dan pengalamannya. Justeru itu seorang saksi mungkin melihat kejadian itu berbeza daripada saksi yang lain. Seorang saksi mungkin boleh memberikan butiran terperinci manakala yang lain mungkin hanya dapat memberi sedikit sahaja. Namun kedua-duanya mungkin memberitahu suatu yang benar tentang apa yang mereka lihat tentang kejadian yang sama itu. Adalah benar, bagaimanapun, bahawa saksi-saksi tertentu mungkin tidak memberitahu suatu yang benar. Maka adalah penting untuk hakim perbicaraan memerhati kelakuan atau perilaku saksi itu semasa memberikan keterangan (lihat perenggan 62).]

Notes

For cases on credibility of witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2673–2705.

For cases on finding of fact, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 395–469.

Cases referred to

Balachandran v Public Prosecutor [2005] 2 MLJ 301 (refd)
Bear Island Foundation v Attorney-General for Ontario 83 DLR (4th) 381 (refd)
Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405 (refd)
Hari Nath v State of UP AIR 1988 SC 345 (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209 (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84 (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528 (refd)
Mahinder Singh v PP [1967] 1 MLJ 126 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; (2005) 6 AMR 203; (2006) 1 CLJ 457 (refd)
Ramlal Singh v State (45) AIR 1958 MP 380 (refd)
Sher Ali v Emperor (29) AIR 1942 Pesh51 (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257 (refd)

Legislation referred to

Criminal Procedure Code s 107
Criminal Procedure Code [India] s 154
Evidence Act 1950 s 27
Penal Code s 34

Appeal from: Criminal Appeals No J-05–52 of 2003 & No J-05–53 of 2003 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellants.
Manoj Kurap (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Alauddin FCJ (now CJ (Malaya):

[1] I have had the advantage of reading the judgments of my learned brothers Abdul Aziz Mohamad, Nik Hashim and Azmel FCJJ and I agree with the reasons assigned and the decision arrived at in the judgment of my learned brother Abdul Aziz Mohamad FCJ and for this reason I would allow the appeals and quash the convictions and set aside the sentences imposed.

Arifin Zakaria FCJ:

[2] My learned brothers Abdul Aziz Mohamad, Nik Hashim and Azmel FCJJ had each written a separate judgment. Abdul Aziz Mohamad FCJ, for the reasons given in his judgment, was of the view that the appeals ought to be allowed, whereas Nik Hashim and Azmel were of the view that the finding of the learned trial judge as affirmed by the Court of Appeal ought to be upheld. Alauddin FCJ had expressed his

agreement with Abdul Aziz Mohamad FCJ. After reading the judgments of my learned brothers, I am inclined to agree with Abdul Aziz Mohamad FCJ that these appeals ought to be allowed for the reasons stated in his judgment. I would therefore allow the appeals and quash the conviction and set aside the sentence imposed.

Nik Hashim FCJ:

BACKGROUND

[3] I have had the advantage of reading the judgment of my learned brother Abdul Aziz Mohamad FCJ in which he concluded that the appellants" appeals must succeed. Sad to say, I am unable to agree with my brother's learned judgment. I think the appeals must fail. My reasons are as follows.

[4] Both the appellants were convicted and sentenced to death by the High Court at Johore Bahru, before Syed Ahmad Helmy JC (as he then was) for the murder of one Sanip bin Leham and against that conviction they had appealed to the Court of Appeal (Richard Malanjum JCA (now CJ (Sabah & Sarawak)) Augustine Paul and Hashim Yusoff JJCA (now FCJJ)) which dismissed their appeals (see [2006] 2 CLJ 528). Hence these appeals to this court.

[5] Before us, learned counsel for the appellants submitted that the death of the deceased was not caused by the appellants as there was no evidence how the deceased was hit. It was pointed out by counsel that there were discrepancies in SP7's evidence particularly on the contents of his first information report (P 24). In P 24, SP7 failed to mention the names of the appellants and this failure constituted a material omission in P 24, thus rendering SP7's evidence suspicious. SP7 was also not consistent in his evidence with regard to the question of whether the appellants were armed when he saw them at the scene. Learned counsel also submitted that it was wrong for the court to find that common intention was established when the evidence of SP7 should not have been believed due to its poor quality. With all the infirmities in his evidence, counsel argued that SP7 should not be held to be a credible and reliable witness.

HIGH COURT

[6] On the above complaints all I need to do is to reproduce the following passages in the judgment of the learned trial judicial commissioner:

> The direct evidence relied upon by the prosecution in proving the second element is that SP7 Lee Cheng Soi @ Hassan bin Abdullah who gave an eye witness account of the incident and though there were no lights nevertheless through the moonlight he was able to identify both the accused carrying something that resembled a piece of wood about 3 feet in length and chasing the deceased.
>
> The defence vigorously challenged the evidence of SP7 on the ground that there is major contradiction in SP7's testimony in examination-in-chief and the cross-examination in relation to whether the 2nd accused (the 1st appellant) did hold a piece of wood and the several contradictions between his oral testimony and exh P 24 which is the police report

lodged by SP7 at 6.45am on the tragic morning of 8 October 1998 particularly the failure to state that the deceased yelled that somebody was hitting his head and asked SP7 to run, that there were three persons and not four as orally testified and failure to mention he saw both the accused runs contrary to the contemporaneous document P 24 and hence no value ought to be placed on his oral evidence. A

The contention of the prosecution is that both the accused had been positively identified by SP7 as he had known the first accused (the 2nd appellant) more than four months before the incident and that the second accused was seen several times looking for the first accused. As regards the *contradiction* it *does not affect the reliability of his evidence of identification* and *there were explanations as to why the names of both the accused were not mentioned in P 24, in that he did not want the deceased's son to quarrel with the first accused.* B

I have scrutinized the evidence and the submissions of both the accused counsel and it is my considered view that the defence contention cannot be accepted. C

In the first place *there is positive identification of not only the presence of both the accused at the place of incident but also their carrying a piece of wood each or something resembling a piece of wood and chasing the deceased.* The prosecution's principal witness SP7 maintained his stand on this aspect of his testimony in the face of vigorous cross-examination. *Both the accused were in front of him when he ran out of the shed — hence at such a short distance and coupled with the fact that it was a moonlit night I have no hesitation in accepting the evidence of SP7 which I found to be a witness of truth* and conclude that there was positive identification of both the accused persons at the place of incident chasing the accused with a piece of wood or something that resembled a piece of wood. Though SP7 did in cross-examination state that he did not see the second accused holding anything in his hand which represents a contradiction to his testimony in evidence in chief nevertheless to my mind it does not affect his testimony that both the accused with two others at large were chasing the accused armed with a piece of wood or something that resembled a piece of wood. D E

Again the defence strenuous attempt to challenge the identification of the accused by SP7 through the contradictions appearing in the police report P 24, namely the failure to state 'Sarip jerit ada orang ketuk kepala dia dan dia suruh saya lari cepat' statement that there were three persons instead of four and the failure to mention both the accused in P 24 does not to my mind affect the testimony of SP7 as to the identification of both the accused. This is because the *discrepancies as such is insufficient to destroy his credibility on the issue of identification.* It must be borne in mind that P 24 was the first information report made prior to the investigation and hence the omission as to the details is acceptable. Further there is evidence as to the reason behind *the failure to mention both the accused by name in P 24 in that he was afraid that the deceased children would go after the accused should their names be mentioned in P 24 and there is nothing incredible in the reasoning for the Court not to accept the explanation.* F G

The totality of the evidence of both the prosecution and the defense clearly to my mind establishes that the prosecution has succeeded in proving the charge against both the accused beyond any reasonable doubt. H

(Emphasis added.)

COURT OF APPEAL I

[7] In dismissing the appeals of both the appellants against their respective conviction and sentence, the Court of Appeal concurred with the finding of the learned trial judicial commissioner on the evidence of SP7 and agreed that the

defense had failed to raise any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that the appellants were guilty as per charge.

FINDINGS OF THIS COURT

[8] Essentially, the appeals were against the findings of the learned trial judicial commissioner in that he accepted the evidence of SP7 and found him to be a witness of truth who had positively identified both the appellants as amongst the assailants of the deceased. SP7 had testified that there was moonlight which enabled him to witness the attack of the deceased.

[9] The approach to be taken by an appellate court when dealing with a trial court's assessment of credibility of witness is well-established by high authorities. The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 (FC); *Dato" Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC); *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 (FC); *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689 CA). It is not the function of an appellate court to make primary findings of facts (see*Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (FC)).

[10] Thus, applying the above principles to the facts of this.case, it is clear that the learned judicial commissioner was alive to the fact that there were contradictions and discrepancies in the evidence of SP7 and nevertheless held that SP7 was a witness of truth. He ruled that the discrepancies were insufficient to destroy SP7's credibility on the issue of identification. He gave his reasons for his finding: such as the short distance between the appellants and SP7 during the incident and the moonlit night. He found the explanation given by SP7 as to why the names of the appellants were not mentioned in P 24 to be credible. It must not be forgotten that P 24 is not an encyclopedia. All that is. required for purpose of s 107 of the Criminal Procedure Code (Act 593) is that there should be clear and definite information about the commission of a cognizable offence to set the investigation machinery in motion. It needs not contain the names of the offenders as in the case here. Further, SP7 was merely a fisherman and a Chinese Muslim and his explanation that he was afraid that the deceased's. children would go after the first appellant should he mention the appellants' names in P 24 is not unreasonable. It must be noted also that the deceased was a Malay and the appellants. were Chinese. This is what he said at p 38 of the record of appeal:

> Rujuk P 24 kepada saksi — saya buat laporan Polis selepas kejadian. Masa saya buat report saya tidak cakap kepada Polis Ah Hong (1st appellant) dan OKT2 (2nd appellant) ada pukul Sarip. Saya tidak cakapkan sedemikian kerana saya takut nanti anak arwah Sarip akan bergaduh dengan Ah Hong

Thus in the circumstances, the failure by SP7 to mention the names of the appellants in P 24 is justified and therefore, the omission is not fatal to the prosecution case.

[11] With regard to the proof of common intention, I agree with the finding of the learned judicial commissioner that common intention may be inferred from the facts and circumstances of the case which are found in the testimony of SP7 who gave an eye witness account of seeing both the appellants together with two others at the scene, both holding something which resemble a piece of wood (P 9(a)) and seeing both the appellants chasing the deceased. On this issue, there was no misdirection on the part of the learned judicial commissioner.

[12] It is very clear from his judgment that the learned trial judicial commissioner took full advantage of the audio visual benefit that he alone enjoyed in coming to his assessment of the credibility of SP7. In my view, there is no ground for disagreeing with his finding on SP7's credibility. Indeed, the Court of Appeal was in complete agreement with that finding.

[13] Having considered the reasons of the Court of Appeal for agreeing with the trial court on the credibility of SP7, I am inclined to agree with it. In coming to such view, I am well aware of the well-known principle that in the event of doubt it must be given favourably to an accused person. But this is not the case here. In the present case, the testimony of SP7, in spite of its infirmities, has impressed the learned trial judicial commissioner to find SP7 to be a witness of truth. In a case of this sort where everything depends on the credibility of a witness about what was said, the view formed by the primary trier of fact, is entitled to great respect and an appellate court lacking the audio visual advantage enjoyed by the trial court should be slow in disturbing the finding of facts arrived by a trial judge. The finding of credibility of SP7 as a truthful witness by the learned judicial commissioner is a primary finding of fact. Therefore, it is not the function of this court to substitute its finding for that of the trial court.

[14] In *Bear Island Foundation v Attorney-General for Ontario* 83 DLR (4th) 381, the Supreme Court of Canada said at p 383:

> This case, it must be underlined, raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts: *Stein v The Ship 'Kathy K'* (1975), 62 DLR (3d) 1, (1976) 2 SCR 802, 6 NR 359; *Century Ins Co of Canada v NV Bocimar SA* (1987), 39 DLR (4th) 465, (1987) 1 SCR 1247, 27 CCLI 51, and *Beaudoin v Daigneault v Richard,* (1984) 1 SCR 2, 37 RFL (2nd) 225, 51 NR 288. The rule is all the stronger in the face of concurrent findings of both courts below.

In the present case, there were no palpable and overriding error on the part of the learned judicial commissioner in his. assessment of the facts.

[15] In my judgment, the learned judicial commissioner was correct to hold that the respondent had succeeded in proving its case beyond any reasonable doubt and that he had considered and accepted the oral evidence of SP7 and that there were no reasons to question his credibility as a witness. The case for the prosecution is neither incredible nor improbable. Since this Court has had no audio visual advantage of the witness, it is only proper that this Court defers to the views of the learned trial judicial commissioner.

[16] Accordingly, I find that the Court of Appeal was right to concur with the decision of the High Court that the appellants were guilty of the charge. These appeals are therefore dismissed and the conviction and sentence are hereby affirmed.

Abdul Aziz Mohamad FCJ:

[17] The two appellants were convicted by the High Court of the murder of one Sanip bin Leham alleged to have been committed on 8 October 1998 at about 4am at the disused mine known as Lombong Jomis, at Km 4, Jalan Sungai Rengit, in the District of Kota Tinggi, in the State of Johor. They were alleged in the charge to have committed the offence jointly with two others who were still at large and the charge against them was brought in reliance on the common intention provisions of s 34 of the Penal Code. Their appeals to the Court of Appeal were dismissed. They now appeal to this court.

[18] At the disused Lombong Jomis there were two rectangular pools, one small and the other large, connected by a neck of water. The deceased Sanip was an inland fisherman who fished at the pools. Fronting the small pool, and just a short distance away from it, were three shacks. The one in the centre was used by Sanip. Almost against it was another shack. The fronts of these two shacks were without a wall and were open.

[19] The second appellant, Lee Kwai Heong ('Ah Hong'), was the first accused in the High Court and the first appellant in the Court of Appeal. The first appellant, Lee Ah Seng ('Ah Seng'), was the second accused in the High Court and the second appellant in the Court of Appeal. In the High Court they were separately represented, Ah Hong's counsel being Encik Hisyam Teh Poh Teik. In the Court of Appeal, as in this court, they were both represented by Encik Hisyam.

[20] After the close of the case for the prosecution, the appellants were called to enter upon their defence. The defence of Ah Hong was one of alibi. The defence of Ah Seng was a denial.

[21] The only eye witness evidence against the appellants was that of Lee Cheng Soi, a Chinese Muslim whose Muslim name is Hassan bin Abdullah. He will be referred to as 'Hassan Lee', although the learned trial judge referred to him as Hassan Abdullah. At the material time he was also a fisherman at Lombong Jomis. On 8 October 1998, the day of the incident, at 4.40 a.m., he lodged a police report

(Sungai Rengit Report 712/98) in which he said as follows: At about 4am, when he was sleeping in his shack, he heard his friend Sanip, who was sleeping in the shack next to his, crying for help and telling him loudly that he had been hit by three unknown persons. Sanip ran out of his shack in an unsteady state. After that he, Hassan Lee, sought the help of a friend by the name of Goh Kim Hooi who was staying at a nearby shack, to obtain assistance from the police station. In the incident, said the report, a motorcycle No JCK 7096 belonging to Sanip was taken away. The exact text of the report, which was in Malay, is as follows:

> Pada jam lebih kurang 4am, 8 Oktober 1998 semasa saya sedang tidur di pondok berhampiran ikan, Jalan Jomis Sg Rengit terdengar jeritan minta tolong daripada kawan saya nama Sanif yang tidur bersebelahan dengan pondok saya. Beliau menjerit memberitahu kepada saya dengan kuat beritahu beliau telah kena pukul oleh tiga orang lelaki yang tidak dikenali. Beliau lari keluar daripada pondoknya dalam keadaan terhoyang hayang. Selepas itu saya meminta tolong dengan kawan nama Goh Kim Hoi yang tinggal dalam pondok berhampiran untuk dapatkan bantuan di balai polis. Dalam kejadian tersebut sebuah m/sikal no. JCK 7096 telah dilarikan bersama kepunyaan Sanif.

[22] It is conspicuous from the report that when Hassan Lee made it he did not implicate anybody in what happened to Sanip.

[23] Sjn/Mejar Harun bin Salleh went to the scene at 4.50am and found Sanip lying covered with blood near one of the four sides of the smaller pool. He was still alive and tried to rise but was unable to speak. A wooden lath (*kayu beroti*) about three feet long was found on the ground about four metres from Sanip (P 9A). It bore blood stains, which were later proved to be human blood Group A, the group of Sanip's blood. About nine metres from Sanip, on the ground by the smaller pool, by the side of it facing the three shacks, was found a length of iron pipe (P 8A) bearing blood stains which subsequently were found insufficient for determining the species of the blood.

[24] Sanip was taken away by ambulance and died in hospital at 9.15am on the same day.

[25] At about 10.30am on the same day ASP Wan Hassan bin Wan Ahmad, the IO, went to the scene with Sjn/Mejar Harun and found a parang sheath outside Sanip's shack.

[26] The post mortem examination carried out on the body of Sanip on 9 October 1998 established that there were seventeen injuries on various parts of the body, including several incised wounds, one of which was at the back of the head. The pathologist was of opinion that the incised wounds could have been caused by a blunt knife or a blunt parang or anything that had an edge that was not sharp, including the wooden lath P 9A if applied by a side having an edge (*bucu*). According to the pathologist, the injuries to the left arm, consisting of a swelling and the fracturing of the radius and ulna bones, could have been caused by the iron pipe P 8A. The pathologist gave brain injuries as the cause of death, resulting from the blow that caused the incised wound at the back of the head. He was of opinion,

judging from the injuries to the left hand and the back of the head, that Sanip and his assailants were face to face when the injuries were inflicted.

[27] Several persons were arrested as suspects. The first arrest was on 9 October 1998, the day after the incident, and the person arrested was Rozanizam bin Borhan, who was released after about a week and became the prosecution's sixth witness. On 18 October 1998, Goh Kim Hooi, whose name was mentioned in Hassan Lee's report, and Mohamed Nizam bin Abu Bakar, were arrested. Goh Kim Hooi was released after fourteen days and in the trial was offered to the defence. Mohamed Nizam was released after three days. Hassan Lee was arrested on 19 October 1998, eleven days after the incident, and was released after fourteen days. The appellants were the last to be arrested, Ah Hong on 21 October 1998 and Ah Seng on 14 November 1998, after Hassan Lee's arrest. Ah Hong was arrested while Hassan Lee was in detention, and after Ah Hong's arrest Hassan Lee continued to be kept in detention for twelve days. He was to admit in cross-examination by Ah Hong's counsel that he was interrogated many times.

[28] On 27 October 1998, after Ah Hong's arrest, Sjn/Mejar Harun found Sanip's motorcycle No. JCK 7096, which Hassan Lee had mentioned in his report, sunk in a marsh (*paya*) about 300 metres from the scene of the incident. Two days later, on 29 October 1998, according to ASP Wan Hassan the IO, he found, about 1400 metres from the place of incident, at a place marked L in the sketch plan P 32, which would have been in the larger pool near one of its four sides, a red torch, which was damaged and was proved to belong to Sanip. In connection with this finding, an information allegedly received from Ah Hong was admitted in evidence under s 27 of the Evidence Act 1950. On 25 November 1998, after the arrest of Ah Seng, according to ASP Wan Hassan, he found, in a building in Kampung Setinggan MIC, Batu 11, Ulu Tiram, Johor, a waist- pouch, which was proved to belong to Sanip. In connection with this finding, an information allegedly received from Ah Seng was admitted in evidence under s 27. In this appeal the learned DPP conceded that those pieces of information from Ah Hong and Ah Seng were inadmissible.

[29] It was in his testimony given in the trial on 2 July 2001, almost three years after the incident, that Hassan Lee, the only eye-witness, implicated the appellants. He was the seventh prosecution witness (SP7 or PW7). His evidence was as follows. At about 4am on 8 October 1998, when he was sleeping in the shack next to Sanip's — which must have been the one stated earlier as being almost against Sanip's shack — he heard Sanip crying out that some person or persons were hitting him on the head — 'ada orang ketuk kepala saya' — and asking him to quickly run away. He went out of his shack and saw Ah Hong and Ah Seng, who were known to him, take a length of wood (*mengambil kayu*) and chase Sanip, who ran to the side of the pool. He was certain that each of the appellants was holding a piece of wood about three feet long. He also saw two other persons whom he could not recognize, but his evidence in examination-in-chief, as recorded by the learned trial judge, did not expressly state what the other two persons actually did. His actual evidence, as recorded, was: 'Ada orang lain juga yang saya nampak pada masa itu. Saya tak kenal orang lain. Semua sekali ada empat orang — dua orang saya tidak cam' (notes, p 29). The judge took the evidence to be that all the four persons chased Sanip. But in

cross-examination by Ah Seng's counsel, Hassan Lee said that he saw three other persons who ran (*yang lari*) but since they were about twenty yards away he could not recognize them. It is not clear from the notes whether the words "*yang lari*" meant that they ran in pursuit of Sanip or they ran away. That would make it five persons that Hassan Lee said he saw in the incident, including the two appellants.

[30] As to what happened after he saw Sanip being pursued, Hassan Lee said in examination-in-chief that he went to look for one Goh Ah Long who was somewhere nearby and both of them went to look for Sanip and found him lying beside the pool. After that they went to the police station, arriving at 4.40am, and Hassan Lee lodged his report. It will be recalled that in his report he said that the person to whom he went for help was Goh Kim Hooi. There is no evidence that Goh Kim Hooi and Goh Ah Long are the names of the same person. In cross-examination by Ah Seng's counsel, Hassan Lee said that after he saw Ah Hong and the three other persons he immediately ran to some bushes and into Ah Hong's shack. There is no evidence to connect sequentially this activity of Hassan Lee's with his evidence of going to Goh Ah Long for help.

[31] As to his testimony that he saw each of the appellants holding a piece of wood, in cross-examination by Ah Seng's counsel Hassan Lee said that the wooden lath P 9A, which the police found near where Sanip was lying on the ground, was not the wood that he saw either appellant was holding and that he did not see Ah Seng holding anything or doing anything. In re-examination he again said that he did not see Ah Seng holding anything ('*saya tidak nampak dia pegang barang*'). As to what he saw Ah Hong was holding, in re-examination he was less definite than he was in examination-in-chief. He said that he saw Ah Hong's hand '*macam pegang kayu*', which could mean that it was as if Ah Hong's hand was holding a piece of wood or Ah Hong was holding what resembled a piece of wood.

[32] In cross-examination by Ah Hong's counsel, Hassan Lee confirmed that Sanip said (when in the shack) that he did not recognize the persons who were hitting him. This point is significant in view of Hassan Lee's evidence in cross-examination by both counsel that Sanip knew Ah Hong and Ah Seng and the opinion of the pathologist that it was likely that he was face to face with his assailants when he received his injuries. This is assuming — because there is no evidence to provide an indication — that the injuries to the left hand and the back of the head on which the pathologist based his opinion were received in the shack and not after Sanip had left the shack. It was a moonlight night and it was by the moonlight that Hassan Lee claimed that he recognized the appellants. Sanip's shack was not walled on one side, so that the inside of the shack could also have been lit by the moon. The question arises whether, if the appellants were among the assailants, it was likely that Sanip, as he was said to have said, did not recognize them.

[33] Hassan Lee was cross-examined by Ah Hong's counsel on his evidence that Sanip cried out to him to quickly run away, which he did not mention in his police report. His reply was that what was in the report was not said by him and that the report was wrong and that it was true that Sanip told him to quickly run away.

In re-examination he said that Sanip's words were '*orang ketuk kepala saya — Pak Hassan lari*' ('someone's hitting my head — run Pak Hassan').

[34] In cross-examination by Ah Hong's counsel, Hassan Lee admitted that when making his report he did not mention Ah Hong's name or his seeing Ah Hong carrying a piece of wood although he agreed that when he went to lodge the report the significant event that was foremost in his mind to say was that he saw Ah Hong, armed with a stick, chasing Sanip. In re-examination he admitted that he did not mention the involvement of the appellants when making his report and he gave as the reason for his failure his fear that Sanip's child or children (*anak*) would quarrel (*bergaduh*) with Ah Hong. He admitted that it was when he was interrogated by the police when he was in detention that he told the police that he saw Ah Hong take a piece of wood (*ambil kayu*) that night.

[35] The most important ground in this appeal is that it is not safe to convict the appellants on the evidence of Hassan Lee, whose evidence was the only evidence that implicated the appellants, because it is not safe to treat Hassan Lee as a truthful witness. The veracity of Hassan Lee is brought into question by reason of several discrepancies between his police report (P 24), which was the first iInformation report ('FIR'), and his evidence and by reason of certain unsatisfactory features in his evidence. Of the discrepancies, the most prominent and significant is the omission to mention in the FIR. the involvement of the appellants and the alleged pursuit of Sanip after he came out of his shack. The omission is not one of mere detail but of the important second half of the events that were related in evidence. That section of the evidence is important because it was there that the appellants were implicated and also because, even if it was true that Sanip said in the shack that he was being hit, the finding of the wooden lath and piece of iron pipe near where Sanip's body was found lying near the pool would suggest that he might have received further injuries there and that, if Hassan Lee's evidence about the chase was true, the chase ended with the infliction of those injuries. But the FIR stopped short at the point where Sanip came out of his shack and omitted to state the pursuit and the persons who did the pursuing. It has also to be borne in mind that the omission was not due to the decision of the officer who took down the report that it was only necessary, for the purposes of an FIR, to write down only so much, but was, on Hassan Lee's own admission, a deliberate omission on his part.

[36] The consequences of an omission to state an important matter in the FIR have been mentioned in several Indian authorities, of which the following may be cited. In *Sher Ali v Emperor* (29) AIR1942 Pesh. 51, at p 52 C2, the story of an incident related by a witness was held to be rightly disbelieved by the trial court because the witness did not mention the incident in the F.I.R. that he had made. In *Ramlal Singh v State* (45) AIR1958 MP 380, paras (12), (13), HR Krishnan J disagreed with the sessions court judge in being very greatly impressed by a boy witness's account of the happening because it was not mentioned in the FIR of the person to whom the boy must have related what he saw if he had seen it. He said that the FIR 'is a piece of corroborative evidence; omissions in it will, other things being the same, deprive prosecution of the most valuable corroboration and thereby make the story suspicious'. In *Hari Nath v State of UP* AIR 1988 SC 345, one at least of several eye

witnesses to a dacoity could reasonably be expected to have known some of the appellants, but the identity of the culprits was not disclosed in the FIR. At para 7, Venkatachaliah J said: 'The omission to disclose their identity in the FIR would raise a reasonable doubt about their complicity in the crime'.

[37] The Court of Appeal said (judgment, para 13) that 'it would not be in accordance with the settled principle if the evidence of PW7 in Court should be considered unreliable by reason of him failing to include the names of the Appellants when he lodged exh P 24'. *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, a decision of this court, was referred to for the 'settled principle', but the passage referred to, which was from para [11], was part of the deliberation on the question of the consequences of failure by the prosecution to tender in evidence the FIR, not the consequences of failure of a witness to include in his report an important information, that is to say, of omissions in the FIR. The Court of Appeal recognized, as may be seen from the next paragraph of their judgment (para 14), that the consequences of omissions in the FIR were considered in *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209, and they cited a passage in which the then Federal Court cited with approval a passage from *Sohoni's* commentary on s 154 of the Indian Criminal Procedure Code (16th Ed, Vol 1, p 750), part of which reads as follows:

> … But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not *ipso facto* lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.
>
> When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission …

[38] In this case the deliberate failure of Hassan Lee to mention in the FIR the second half of the incident, including the appellants' involvement in it, should have given cause to the learned trial judge to be very careful about accepting Hassan Lee's evidence of the appellants' complicity in the crime. Of course if there was a reasonable explanation for the failure, it should not have any effect on the veracity of Hassan Lee. As has been stated, the reason that he gave for the failure was his fear that Sanip's child or children would quarrel with Ah Hong. At pp 16 and 17 of his judgment, the learned trial judge firstly treated the failure 'as an omission as to details', which, as already shown, it clearly was not, and secondly, as regards Hassan Lee's explanation, said that 'there is nothing incredible in the reasoning for the court not to accept the explanation'.

[39] With respect, in my judgment the explanation was inherently improbable. It is unnatural for a person who claims to have seen another commit a crime to report the crime and yet withhold the identity of the perpetrator, because the purpose of reporting a crime is to bring the wrongdoer to justice. It would require a very strong reason to deter one from revealing the culprit. The reason given by Hassan Lee was extremely weak. No reason was given as to why he was so protective of Ah Hong, who

to his mind was involved in the commission of a crime against Sanip, who was his friend, from any likely trouble from Sanip's children. Even if the *bergaduh* that Hassan Lee feared was that Ah Hong's children would seek to wreak vengeance on Ah Hong, no reason was given — such as the character of Sanip's children — as to why Hassan Lee thought that Sanip's children would take the law into their own hands and not let the law take its course. Furthermore, Hassan Lee would surely have thought, as everyone else would, that if he mentioned the appellants to the police, the police would be likely to immediately arrest them, so that there would be no question of Sanip's children going after Ah Hong. Or even if Hassan Lee feared that some time would elapse before the police could arrest Ah Hong, he was not likely to have thought that in the meantime the fact that he had mentioned Ah Hong to the police would leak out to Sanip's children and that they would get at Ah Hong before the police could. Then there is the consideration that by failing to reveal the identity of Ah Hong in order to protect him from Sanip's children, Hassan Lee placed his own self in jeopardy, since, as it turned out, he himself was arrested as a suspect. It is unlikely that Hassan Lee could have failed to foresee such a consequence of his reticence. There is no reason to make it credible that Hassan Lee was so concerned for Ah Hong's welfare as to be willing to face the risk of jeopardy himself. Looked at from any angle, Hassan Lee's explanation was absurd. In my judgment the learned trial judge simply accepted Hassan Lee's explanation without judiciously weighing it. The Court of Appeal apparently went along with the learned trial judge's finding that Hassan Lee's explanation was not inherently improbable, because in para 20 of their judgment they merely said — and that was in dealing with the contention that it was probably from motives of self-preservation that Hassan Lee finally named the appellants: 'The explanation given by PW7 for not mentioning the appellants in his police report should answer the contention'.

[40] The logic is simple. If it was true that Hassan Lee, as he said in evidence, saw the appellants chase Sanip, by the natural course of human conduct he would have mentioned the fact in the FIR. Since he did not, and he failed to give a reasonable explanation for the omission, the truth of his evidence becomes open to at least a reasonable doubt.

[41] The learned DPP submitted that the learned trial judge had found Hassan Lee to be a witness of truth and that we ought not to interfere with that assessment because the credibility of a witness is primarily a matter for the trial judge. In para 30 of his written submission the learned DPP said this:

> It is respectfully submitted that the learned trial judge's assessment of the credibility of SP7 is without fault. Reasons were given for that positive assessment after duly considering discrepancies and contradictions contained. Such assessment by the learned trial judge, in keeping with high authority, is entitled to due deference.

[42] The learned trial judge's assessment of credibility that the learned DPP referred to is found at pp 11 and 12 of the judgment where the learned trial judge, in rejecting the defence submission as to the credibility of Hassan Lee, said:

> In the first place there is positive identification of not only the presence of both the accused at the place of incident but also their carrying a piece of wood each or something resembling

a piece of wood and chasing the deceased. The prosecution's principal witness SP7 maintained his stand on this aspect of his testimony in the face of vigorous cross-examination. Both the accused were in front of him when he ran out of the shed — hence at such a short distance and coupled with the fact that it was a moonlit night I have no hesitation in accepting the evidence of SP7 *which I found to be a witness of truth* and conclude that there was positive identification of both the accused persons at the place of incident chasing the accused with a piece of wood or something that resembled a piece of wood. Though SP7 did in cross-examination stated [*sic*] that he did not see the second accused holding anything in his hand which represents a contradiction to his testimony in evidence in chief nevertheless to my mind it does not affect his testimony that both the accused with two others at large were chasing the accused [*sic*] armed with a piece of wood or something that resembled a piece of wood. (Emphasis added.)

[43] It would appear from that passage that the finding that Hassan Lee was a witness of truth was made on the basis that he was unshaken in cross-examination and that the circumstances — closeness and moonlight — were favourable for an unmistaken identification. With respect, when the suggestion is that a witness is not speaking the truth in implicating a person, that is to say, that he is saying that the person was present at a place when he knows that the person was not, the fact that the circumstances were favourable to an unmistaken identification does nothing to prove that the witness is a witness of truth. The favourable circumstances go to the question of correctness of observation and do so only in respect of a witness who believes that his observation is correct.

[44] As to being unshaken in cross-examination, Hassan Lee's mere insistence that he saw the appellants chasing Sanip does not necessarily make him a witness of truth. The fact, however, is that he *was* shaken in cross-examination at least in one important respect pertaining to the appellant Ah Seng. As has been related, in examination-in-chief he stated positively that he saw both the appellants chasing Sanip, each carrying a stick, but in cross-examination and even in re-examination he said that the appellant Ah Seng was not carrying anything and was not doing anything. Since Hassan Lee's evidence consisted, in essence, only of his hearing Sanip's cry and seeing the appellants chasing Sanip, each carrying a piece of wood, his subsequent dropping of Ah Seng out of that picture constitutes being shaken as to fifty per cent of his evidence. The learned trial judge, as can be seen from the passage quoted earlier, recognized this 'contradiction', but said 'nevertheless to my mind it does not affect his testimony that both the accused with two others at large were chasing the accused [*sic*] armed with a piece of wood or something that resembled a piece of wood'. It would appear as if the learned trial judge merely brushed aside the contradiction, ignored the benefit derived for Ah Seng from Hassan Lee's admission in cross-examination that he was not holding anything and — which the judge failed to mention — was not doing anything, and proceeded on the basis that Hassan Lee's evidence was that both the appellants were chasing Sanip while holding a piece of wood or — which, according to the notes, Hassan Lee said in re-examination in reference to Ah Hong — '*macam pegang kayu*'.

[45] On that aspect of Hassan Lee's evidence, the Court of Appeal, in para 18 of their judgment, taking 'the view that the learned trial Judge did examine the evidence of PW7 and applied the correct judicially accepted test', said:

> Discrepancies are there in the testimony of PW7 in relation to exh P 24. One discrepancy highlighted was whether the second Appellant was armed when PW7 allegedly saw him chasing the deceased. From the evidence recorded PW7 corrected himself in re-examination that the second Appellant was not armed. Thus, nothing turns on this point. In any event we are in agreement with the learned trial Judge that the explanation given is not inherently incredible as to warrant a complete rejection of the evidence of PW7.

[46] It is to be observed that the Court of Appeal seem to view the point, firstly, as one of discrepancy between Hassan Lee's evidence and the FIR (P 24), and, secondly, as a point as to which Hassan Lee corrected himself in re-examination and therefore 'nothing turns on this point'. As has been related, it was a point of contradiction between his evidence in his examination-in-chief and his evidence in cross-examination, which contradiction he maintained in re-examination. In examination-in-chief he said that Ah Seng carried a piece of wood, in cross-examination he said that Ah Seng was not holding anything and in re-examination he continued to say that he did not see Ah Seng holding anything. And it was not at all a case of correction in re-examination. It was not a case of Hassan Lee saying in re-examination that in fact Ah Seng did hold a piece of wood and that his answer in cross-examination was for some reason a mistake. Furthermore, in taking the view that Hassan Lee corrected himself in re-examination, the Court of Appeal had to be accepting as correct Hassan Lee's evidence in re-examination, which was that Ah Seng was not holding anything, and therefore should have been critical of the learned trial judge's brushing aside of that evidence and proceeding still on the basis that Ah Seng was chasing Sanip armed with a piece of wood. To me, it serves as a clear indication that the learned trial judge did not subject Hassan Lee's evidence to a critical examination but was determined to treat him as a witness of truth where his evidence in examination-in-chief was concerned.

[47] It may be argued, although this was not expressly done in this appeal, that the learned trial judge found Hassan Lee to be a witness of truth on the strength of his demeanour, but he has not expressed this as his reason for so finding. In any case, he could not validly make such a finding without attempting a rationalization of Hassan Lee's contradictory evidence on an important point.

[48] It is also to be observed that the Court of Appeal, in relation to this question, also said that they agreed with the learned trial judge that Hassan Lee's explanation was 'not inherently incredible'. I think, with respect, that the Court of Appeal again fell into confusion there. Hassan Lee did not give any explanation of the contradiction. The explanation that Hassan Lee gave and that the learned trial judge found not inherently incredible was the explanation of his failure to mention the appellants in the FIR, which, as I have said, is absurd.

[49] The learned trial judge's finding of Hassan Lee as a witness of truth is therefore highly questionable.

[50] I should like to mention just two cases in which this court did not accept the finding of the trial judge that a witness was a witness of truth. In *Mahinder Singh v Public Prosecutor* [1967] 1 MLJ 126, where the charge of voluntarily causing grievous

hurt depended solely on the uncorroborated evidence of the complainant, the trial judge had believed the complainant's evidence that it was the appellant who had stabbed him because 'his evidence as regards his ability to identify the assailant was completely unshaken'. Ong Hock Thye FJ (as he then was) said that the trial judge failed to consider certain 'self-contradictions' in the answers given by the complainant in cross-examination and that, if those answers were considered, 'there can no longer be that degree of satisfaction of guilt of an accused person which alone can justify a verdict of guilty'. In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405, the majority of the court, after considering as a whole the evidence of the witness who had alleged being sodomized, were unable to agree with the 'firm finding' of the learned trial judge and the Court of Appeal that he 'is a wholly reliable, credible and truthful witness' (p 258 paras D–I). At p 418 Abdul Hamid Mohamad FCJ said:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh's* case ([1964] 2 MLJ 209) 'there are substantial and compelling reasons for disagreeing with the finding.' Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

[51] The learned trial judge also relied on circumstantial evidence to conclude that the appellants committed the crime. This may be seen at pp 17 and 21 of his judgment where he relied on the evidence of the chemist (SP1), the pathologist (SP4), Rozanizam bin Borhan (SP6), who has been mentioned as one of those arrested as suspects, and of the s 27 informations which, as I have said, the learned DPP has now conceded are not admissible, and which, I should add, the learned trial judge, while taking them into consideration, did not at all set out what they said. At p 17 the learned trial judge said: 'Aside from the direct evidence of SP7 there is also the circumstantial evidence through the testimony of SP6, SP4 and SP1 the chemist which I am satisfied proves the guilt of the both [*sic*] accused'. At p 24, the learned trial judge concluded: 'Hence the cumulative effect of the evidence as presented above clearly leads me to the irresistible conclusion that it was both the accused that committed the offence.' As regards the evidence of Rozanizam (SP6), the Court of Appeal, in para 23 of their judgment, said that 'the trial judge merely alluded to it and in passing' and that 'we did not find that he substantially relied on it in coming to his decision'. But the learned trial judge did rely on it as a piece of circumstantial evidence.

[52] The evidence of the chemist cannot be used as circumstantial evidence pointing to the appellants. The evidence of the chemist merely served to link the exhibits found to the victim. The evidence of the pathologist merely served to establish the cause of death and intention to cause death. Their evidence did not serve to establish the identity of the offenders.

[53] As to Rozanizam, his evidence was that he had been working for Ah Hong but had stopped on 15 October 1998. On 16 and 17 October 1998 he went to see

Ah Hong to get his shirt and shoes, when Ah Hong inadvertently said (*terlepas keluar cakap*) that he wanted to whack (*belasah*) Sanip. After giving those specific dates, he said that when he took his shoes Sanip had not died yet. This witness's evidence is clearly unreliable because the specific dates that he gave was after Sanip's death and Ah Hong could not, after Sanip's death, be wanting to whack him. After giving those specific dates, to say that it happened before Sanip died could not mend his credibility. The learned trial judge, at p 17 of his judgment, without stating that the witness gave those specific dates, merely glossed over this oddity by saying that the witness 'was a bit confused as to the actual date'. The learned DPP has not sought in this appeal to rely on the evidence of this witness as a piece circumstantial evidence. This may be seen from para 62 h of his written submission, where he mentions only the evidence of the chemist, the pathologist and the IO (SP10), who gave evidence as to the section 27 informations, which have been conceded to be inadmissible.

[54] There is therefore no circumstantial evidence to support Hassan Lee's evidence implicating the appellants.

[55] It is not only in the implicating of the appellants in the events that took place on the night in question that Hassan Lee's evidence is open to reasonable doubt, by reason that his reason for not mentioning the appellants in the FIR is absurd. There are indications that make for doubting that the events of that night occurred as Hassan Lee related them in evidence. In cross-examination it was put to him that he was covering up certain facts pertaining to this case, which he of course denied.

[56] There is the question whether Sanip did in fact say that he could not recognize his attackers. If he did say so, which Hassan Lee insisted he did, it would, as has been indicated earlier, be a point in the appellants' favour. But it is not natural for a person who cries out to another in the course of being attacked or is on the point of running away after being attacked to include in his cries information as to whether he did or did not recognize his assailants. Then there is the question whether in fact Sanip did tell Hassan Lee to run away, because that would mean that Hassan Lee would also be in danger from the assailants and that Sanip, while himself being in danger, still could think of Hassan Lee's safety. It was as if Sanip thought that his assailants had come to attack everyone found at the place. Then there is the question of the number of persons. Were there four or five persons? Then there is the problem of fitting Ah Seng into the scene and the sequence of events, assuming that he was there, if, as Hassan Lee said, he was not carrying anything and not doing anything, let alone chasing Sanip. Then there is the question of the weapons. Since Hassan Lee said that the weapon that he saw Ah Hong carry was not the wooden lath P 9A, which bore stains of Sanip's blood, whose weapon was it? Whose weapon was the iron pipe P 8A? Hassan Lee did not say that the two or three other persons carried any weapons. As I said, it is not clear from the judge's notes of Hassan Lee's evidence that they also pursued Sanip. Then there is the question whether Goh Kim Hooi and Goh Ah Long were the same person and, if not, which of them did Hassan Lee go to for help? Then there is the problem of fitting the picture of Hassan Lee going to seek the person with his running into some bushes and into Ah Hong's shack.

[57] Finally there is a point that was never taken up in cross-examination or in submission in the High Court, in the Court of Appeal or before us, but nevertheless is a point that stands out starkly and cannot be ignored. The evidence is that Sanip's motorcycle was found in a marsh on 27 October 1998. Hassan Lee in his police report stated that Sanip's motorcycle was taken away in the incident that night. According to him the incident occurred at 4am. He lodged his report at 4.40 a.m. That means that between 4 and 4.40am he came to know that some person or persons took away Sanip's motorcycle. It is likely that his knowledge came from his own observation of what took place between 4am and before he left to lodge his report, which would be sometime before 4.40 a.m. But his evidence was only that he saw the appellants chasing Sanip, and the taking of the motorcycle does not fit into that picture. Apart from that, there is the question of who took away the motorcycle and what part did they actually play in the incident that night. Going by Hassan Lee's evidence, it was not the two or three other persons whom he said he saw.

[58] Those are indications that raise a reasonable inference that something more happened that night pertaining to the attack on Sanip that was not related by Hassan Lee in evidence and that what happened that night was not wholly as related by Hassan Lee. That, and the doubt as to Hassan Lee's veracity in implicating the appellants in the incident, render the appellants' conviction unsafe. For that reason I would allow their appeal, set aside their conviction and the sentence imposed and acquit and discharge them.

Azmel FCJ:

[59] I have read the judgment of my learned brother Abdul Aziz Mohamad FCJ and also the judgment of my learned brother Nik Hashim FCJ. I am fully in agreement with the decision of my learned brother Nik Hashim FCJ that these appeals be dismissed.

[60] These appeals were based entirely on findings of facts made by the learned trial judicial commissioner. The conviction of the two appellants for the offence of murder of one Sarip bin Leham were based mainly on the evidence of SP7. Despite the existence of discrepancies in the evidence of SP7 the learned judicial commissioner still accepted SP7 to be a truthful and reliable witness as he was satisfied with SP7's explaination in respect of the discrepancies. In arriving at this conclusion the learned judicial commissioner had carefully scrutinized the evidence before him and the submissions of both the accused counsel.

[61] It has been generally accepted that the evidence of a witness will contain contradictions and discrepancies. But that does not mean that he is not a truthful and unreliable witness. In other words no witness is capable of giving perfect evidence. And it has been frequently ruled by courts that flawless evidence of a witness should be looked with suspicion as there is great likelihood that he had been coached or his evidence concocted.

[62] The ability of a witness to narrate and recollect any particular incident depends very much on his level of education, intelligence, upbring and experience. Hence one witness may perceive the incident differently from another witness. One witness may be able to give detailed account while the other may only be able to give it scantily. But both may be telling the truth of what they perceive of the same incident. It is true, however, that certain witnesses may not be telling the truth. Hence it is very essential for the trial judge to observe the behaviour or the demeanour of the witness while giving evidence.

[63] Such observation would to a large extent help him to determine whether the witness is truthful or otherwise. This is one important aspect where an appellate court does not have the audio-visual advantage of the witness, to that extent somewhat handicapped in making a proper assessment as regards the credibility of the witness. Merely relying on what is stated in the notes of evidence would be grossly insufficient.

[64] It is for that reason that a guiding principle for the appellate court has been well established that in dealing with issues of facts the appellate court should be very slow in disturbing the finding of the trial judge. I only need to refer to the decision of Abdul Hamid FJ (as he then was) in the Federal Court case of *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 at p 93 where His Lordship stated as follows:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.

[65] In respect of the same principle I refer to the case of *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 where Ong Hock Thye CJ (Malaya) said (at p 211):

> The learned trial judge, having heard the complainant's explanation, was satisfied that the latter was still very much shaken by the alarming experience he had underdone when he made his report but that, despite his agitation, he did mention some names to the police. This was a finding of fact that the report which was taken down contained errors and omissions for which the constable alone was responsible. The view of the trial judge as to the credibility of the witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding.

[66] It is on the basis of this well established principle that on the facts and circumstances of this case I find myself unable to disturb the finding of fact made by the learned judicial commissioner because I am unable to see how SP7 behaved

himself while giving evidence. SP7 is a simple kampong folk with low level of intelligence. There was nothing to suggest that he would gain anything by stating what he said in court. Due to his level of intelligence and life style, his evidence undoubtedly, contained several contradictions. But that does not necessarily mean he was not telling the truth. He had satisfactorily explained the contradictions in his evidence.

[67] The learned judicial commissioner ruled that SP7's identification of the Appellants was positive. SP7 had also explained why his 1st information report did not mention the names of the Appellants. Such explanations were accepted by the learned judicial commissioner. In my view it is quite improper to rule that SP7 is not a reliable witness, purely on the basis that his evidence contained a number of contradictions without my having the advantage of seeing his demeanour while giving evidence. The learned judicial commissioner had given his reasons why he concluded that SP7 was a truthful and reliable witness. Only he had seen SP7 giving evidence and observed his behaviour. And he made the ruling that SP7 was a truthful and reliable witness.

[68] Furthermore the three judges of the Court of Appeal had unanimously confirmed the finding of facts of the learned judicial commissioner. In the light of the concurrent finding of facts by the courts below I am of the view that it is not proper to disturb his finding.

[69] In support of such view I refer to the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, where Abdul Malek Ahmad FCJ (as he then was) said at p 273):

> In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite law that the appellate court is not prepared to interfere with the concurrent finding of facts made by the courts below as held by this court in *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 at p 523.

[70] I would accordingly dismiss these appeals. The conviction and sentence would hereby be affirmed.

Appeals allowed by majority. Convictions quashed and sentences imposed set aside.

Reported by Navit Kaur Randhawa